

# **Indigent Representation: A Growing National Crisis**

*Testimony of*

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Committee on the Judiciary  
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Chairman Scott, Ranking Member Gohmert, and Members of the Committee and Subcommittee, thank you for the opportunity to speak today on the subject of indigent representation in criminal cases. My name is Erik Luna, and I am a law professor at Washington and Lee University School of Law and an adjunct scholar with the Cato Institute.<sup>1</sup> I specialize in criminal law, criminal procedure, and allied areas of law and public policy. It is an honor to participate in today's hearing with such a distinguished group of witnesses and before an audience that includes some of the leading researchers and activists in the area of indigent defense.

I come before you as an advocate for the constitutional values that protect both individual liberty and limited government. As for the former, I am a firm believer in the Sixth Amendment right to counsel and the constitutional duty of the state to provide competent legal representation to indigent defendants whose liberty the prosecuting jurisdiction seeks to deprive.<sup>2</sup> Indeed, I might go further than some. Among other things, it is problematic that the impoverished may be convicted without counsel, their names sullied and future opportunities jeopardized, simply because incarceration does not ensue.<sup>3</sup> But fidelity to the U.S. Constitution does not begin and end with the Bill of Rights. Other constitutional values, like federalism, not only ensure limited government but also provide structural protection of liberty by preventing the concentration of power in either state or federal government.<sup>4</sup> It is the interaction between these constitutional values, as well as policy considerations regarding incentive structures and interests, that may be the most difficult issue in this hearing and, in all honesty, the reason we are here today.

## **1. THE SIXTH AMENDMENT AND INDIGENT DEFENSE REPRESENTATION**

At the outset, it is important to express my agreement with much of the critical commentary in this area, including the Report of the National Right to Counsel Committee ("NRCC") and the opinions expressed today by my fellow panelists. As the Supreme Court once said, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."<sup>5</sup> And it is just as true today as it was in 1963 that defense attorneys are "necessities, not luxuries," in the criminal process:

[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities,

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<sup>1</sup> All opinions expressed and any errors herein are my own.

<sup>2</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>3</sup> *Contra Scott v. Illinois*, 440 U.S. 367 (1979).

<sup>4</sup> *See, e.g.*, THE FEDERALIST No. 28, at 180-81 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *id.*, No. 51, at 323 (James Madison).

<sup>5</sup> *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (requiring state to provide trial transcript to indigent defendant based on constitutional guaranties of due process and equal protection).

not luxuries.... From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.<sup>6</sup>

Nearly a half-century later, however, there are American jurisdictions where the impoverished defendant receives the facade of legal representation, which at best meets the letter of the Sixth Amendment right but certainly not its spirit, and at worst fails to maintain even the pretense of constitutional compliance. Echoing other compelling works,<sup>7</sup> the NRCC Report provides a comprehensive and, in many ways, brilliant review of indigent defense in jurisdictions across the nation.<sup>8</sup> The problems it details should be disconcerting to anyone who cares about criminal justice: inadequate compensation and excessive caseloads for defense lawyers; the lack of resources for investigators, expert witnesses, interpreters, and support staff; the absence of meaningful training programs, oversight, and performance standards; incompetent and unethical lawyering; and undue judicial involvement and interference with the defense function.

Most of these problems stem directly from parsimonious decision-making and grossly insufficient funding by the states. As a result, defense counsel are poorly compensated, to the point that some cannot make ends meet or have to take on caseloads that violate their professional duties to their clients. The ultimate consequences are borne by indigent defendants themselves – who languish in jail before being assigned an attorney and who have little if any meaningful contact with that attorney; whose cases are insufficiently investigated and whose legal claims go unexplored; and who receive representation that is, in the words of the NRCC Report, “perfunctory and so deficient as not to amount to representation at all.”<sup>9</sup> All of this constitutes a deprivation of procedural justice, with indigent defendants propelled through a process that lacks many of the hallmarks of a decent legal system. Even more troubling is the potential deprivation of substantive justice. Without competent representation, individuals may be inappropriately charged or excessively punished, and viable legal and factual defenses may never be raised. Most alarming is the possibility of convicting the innocent, the worst of all miscarriages of justice. With two decades of DNA-based exonerations, it is now clear that shoddy defense lawyering is a major contributor to wrongful convictions.<sup>10</sup>

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<sup>6</sup> *Gideon*, 372 U.S. 344. See also *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

<sup>7</sup> See NATIONAL LEGAL AID & DEFENDER ASSOCIATION, TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS IN MICHIGAN, A RACE TO THE BOTTOM – SPEED & SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS (June 2008); ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE: A REPORT ON THE AMERICAN BAR ASSOCIATION’S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS* (Dec. 2004) (hereinafter “*GIDEON’S BROKEN PROMISE*”). See also “State and Local Indigent Defense Studies & Reports,” ABA Standing Committee on Legal Aid and Indigent Defendants, available at [www.abanet.org/legal/services/sclaid/defender/reports.html#sta](http://www.abanet.org/legal/services/sclaid/defender/reports.html#sta).

<sup>8</sup> REPORT OF THE NATIONAL RIGHT TO COUNSEL COMMITTEE, *JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL* (April 2009) (hereinafter “*JUSTICE DENIED*”).

<sup>9</sup> *Id.* at xii.

<sup>10</sup> See, e.g., Lewis, A. Kaplan, *Wrongful Convictions and the Right to Counsel*, N.Y. L.J., May 6, 2009; JIM DWYER, PETER NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE* ch. 9 (2000).

## 2. RECOMMENDATIONS

The NRCC Report offers a somber evaluation of jurisdictions that fail to meet their obligations under the Sixth Amendment. I find the situation deeply disturbing and suspect this sentiment is shared by many in the room, regardless of political party. The real issue, then, is not whether a “constitutional crisis” exists, but what entity created the dilemma and what should be done to resolve it – in other words, questions of responsibility and remedy. Like previous works, the NRCC Report sets out a series of recommendations to deal with the problems of indigent defense. Almost all are unobjectionable, if not laudable, including: the creation of a state board or commission responsible for indigent defense services; the establishment of qualification, performance, and workload standards for defense counsel; the prompt determination of eligibility and assignment of counsel for indigent defendants; the collection of data on cases involving indigent representation; the adoption of open file discovery policies in prosecutorial offices; the obligation of defense counsel to refuse excessive caseloads; and the duty of all criminal justice actors to ensure against ethical violations implicating the rights of indigent defendants.<sup>11</sup>

In the following, I would like to highlight several recommendations that deserve special attention in this hearing.

### A. WHAT STATES *MUST* DO

Among its recommendations, the NRCC Report states that “legislators should appropriate adequate funds so that quality indigent defense services can be provided,”<sup>12</sup> which would include fair compensation for counsel and resources for those services necessary for effective legal representation (e.g., independent experts and investigators).<sup>13</sup> My only quibble with the relevant recommendations is the use of the word *should* rather than *must*. By and large, these are not aspirational norms but instead mandatory duties, based on the states’ fundamental obligation to provide sufficient funds for competent indigent representation. Under *Gideon v. Wainwright*,<sup>14</sup> *Griffin v. Illinois*,<sup>15</sup> *Ake v. Oklahoma*,<sup>16</sup> and their progeny, an indigent defendant has the constitutional right to appointed counsel, state-provided expert witnesses, and other services that assure “a fair opportunity to present his defense” and “the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.”<sup>17</sup> From the attorney’s perspective, the failure of the state to pay for the necessary expenses associated with indigent representation may amount to an unconstitutional taking of property.<sup>18</sup>

Not only is it constitutionally required that the relevant jurisdiction pay for expenses related to indigent defense, it is altogether fitting. After all, the states and their agents are the ones who set the entire process in motion and have made all of the choices that have resulted in the current

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<sup>11</sup> See JUSTICE DENIED, *supra*, at 185-90, 191-94, 197-98, 197-98, 202-07 (Recommendations 2-3, 5-6, 9, 11, 14-16).

<sup>12</sup> *Id.* at 183 (Recommendation 1).

<sup>13</sup> See *id.* at 194-97 (Recommendations 7 and 8).

<sup>14</sup> 372 U.S. 335 (1963).

<sup>15</sup> 351 U.S. 12 (1956).

<sup>16</sup> 470 U.S. 68 (1985).

<sup>17</sup> *Id.* at 76. *But cf.* *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

<sup>18</sup> See, e.g., *Williamson v. Vardeman*, 674 F.2d 1211 (8th Cir. 1982).

“constitutional crisis.” State lawmakers determine what will be a crime in the first place, as well as the principles of culpability and degrees of punishment. They decide the amount of funding for courts, jails and prisons, and all levels of law enforcement. In turn, state executives choose which individuals will be propelled into the criminal justice system, with police officers using their power to investigate and arrest and state attorneys exercising their authority to charge and prosecute. As a matter of federal constitutional law, the states have no obligation to criminalize and punish any particular behavior, nor are they required to arrest and prosecute any given individual. But when jurisdictions choose to employ the awesome power to deprive individual liberty, they have an absolute duty to comply with the U.S. Constitution, including the Sixth Amendment right to counsel.

In practice, the states have brought any crisis upon themselves through, *inter alia*, overcriminalization<sup>19</sup> – abusing the law’s supreme force by enacting dubious criminal provisions and excessive punishments, and overloading the system with arrests and prosecutions of questionable value. State penal codes have become bloated by a continuous stream of legislative additions and amendments, particularly in response to interest-group lobbying and high-profile cases,<sup>20</sup> producing a one-way ratchet toward broader liability and harsher punishment. Lawmakers have a strong incentive to add new offenses and enhanced penalties, as conventional wisdom suggests that appearing tough on crime fills campaign coffers and helps win elections, irrespective of the underlying justification. Law enforcement also has an interest in a more expansive criminal justice system, with the prospects of promotion (or reelection) often correlated to the number of arrests for police and convictions for prosecutors.<sup>21</sup>

As a result, the United States has now become the most punitive nation by virtually every measure and the world’s leader in incarcerating its own population,<sup>22</sup> all during a time of decreasing rates of violent and serious crime.<sup>23</sup> The NRCC Report notes that a significant percentage of inmates are locked up not for committing new crimes but for violating the terms of their release, often for rather trifling infringements like missing a scheduled appointment with a parole or probation officer.<sup>24</sup> The Report also discusses the overcriminalization of low-level misconduct, from riding bikes on sidewalks to driving on a suspended license.<sup>25</sup> The NRCC

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<sup>19</sup> See, e.g., Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).

<sup>20</sup> See, e.g., Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169 (2003).

<sup>21</sup> In addition, officials sometimes have a financial incentive to pursue low-level violations with impunity. See, e.g., Howard Witt, *Driving Through Tenaha, Texas, Doesn’t Pay for Some*, L.A. TIMES, Mar. 11, 2009; David A. Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 561-63 (1997).

<sup>22</sup> See, e.g., Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, April 23, 2008. At the beginning of 2008, the United States had an adult inmate population of 2.3 million people, meaning that one out of every 100 Americans was incarcerated. To put things in perspective, if you placed a prison wall around North Dakota, South Dakota, and Wyoming and counted every single person as an inmate, it would still not equal the nation’s total prison and jail population – but the number gets close by adding, say, American Samoa, Guam, and the U.S. Virgin Islands as penal colonies.

<sup>23</sup> See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (online) tbl. 3.106.2007, available at <http://www.albany.edu/sourcebook/> (hereinafter “SOURCEBOOK”).

<sup>24</sup> See JUSTICE DENIED, *supra*, at 71.

<sup>25</sup> *Id.* at 73. See also NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS* 25-28 (Apr. 2009) (hereinafter “MINOR CRIMES”).

Report does not mention, however, the single greatest criminal justice boondoggle of all time: the multi-billion dollar “war on drugs” that overloads court dockets around the nation.<sup>26</sup>

But just as the states have the ability to create and enforce criminal provisions, no matter how picayune, they have the power to provide the necessary resources for defense counsel, to pare back their bloated penal codes and reduce lengthy sentences, and to be more prudent in the enforcement of criminal laws on the streets and in courthouses. Despite current economic straits, there should be no doubt that the relevant jurisdictions can provide the funds for competent indigent representation. State lawmakers have always had the means to do so but have chosen not to meet their constitutional obligations. As the NRCC Report notes, “[i]n the competition for state funds, indigent defense is frequently at the back of the line.”<sup>27</sup> Prosecutors typically receive far greater state funding than defense counsel, leading to disparities in salaries and number of attorneys;<sup>28</sup> and needless to say, the states pay vast sums for legal work and programs that are *not* constitutionally required.<sup>29</sup> Moreover, the states can decriminalize conduct that poses little or no risk to public safety, which the NRCC Report recommends<sup>30</sup> and some jurisdictions have in fact done.<sup>31</sup>

In the end, the states can and must provide the necessary resources for defense counsel, whether by increasing funding of indigent representation or by reducing the number of criminal cases and thus the need for defense counsel in the first place. If they refuse to do so, a different set of NRCC recommendations should be pursued, specifically, those involving litigation.<sup>32</sup> The recalcitrant state officials should be held to answer in the appropriate tribunal pursuant to a simple but essential ideal: A jurisdiction may not deprive individuals of their liberty through a process that denies basic rights, including the Sixth Amendment right to counsel.

## **B. WHAT CONGRESS SHOULD *NOT* DO**

The NRCC Report also recommends that the federal government provide substantial financial support for indigent representation in state criminal justice systems,<sup>33</sup> including the creation of “an independent, adequately funded National Center for Defense Services.”<sup>34</sup> This reiterates a long-standing proposal by the American Bar Association, as well as a congressional bill sponsored by Sen. Kennedy and Rep. Rodino in 1979-80.<sup>35</sup> On its face, federal funding

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<sup>26</sup> In 2007, 1.8 million American were arrested for drug violations (80% for possession). See SOURCEBOOK, *supra*, at tbls. 4.1.2007 & 4.29.2007. In recent years, state drug offenses have accounted for a third of all felony convictions and at least one out of every five inmates. See, e.g., *id.* at tbls. 5.44.2004, 6.20, 6.0001.2005.

<sup>27</sup> JUSTICE DENIED, *supra*, at 57.

<sup>28</sup> See, e.g., *id.* at 61-64.

<sup>29</sup> See, e.g., Stephen Bright, *Georgia Beggars Indigent Defense: As Lawyers for the Poor Get a Pittance, Prosecutors Enjoy a Blank Check, Want to Pick Opponents*, DAILY REP. (Fulton County, Ga.), Jan. 4, 2008 (“It’s not that Georgia doesn’t have the money. It pays private attorneys rates between \$125 and \$225 for legal work that is not constitutionally required, more than the \$95-per-hour rate paid for appointed lawyers in capital cases. And of course it spends millions of dollars on other things that are not constitutionally required.”).

<sup>30</sup> See JUSTICE DENIED, *supra*, at 198-99 (Recommendation 10).

<sup>31</sup> See, e.g., MINOR CRIMES, *supra*, at 27-28.

<sup>32</sup> See JUSTICE DENIED, *supra*, at 210-13 (Recommendations 19-22).

<sup>33</sup> See *id.* at 200-02 (Recommendations 12 and 13).

<sup>34</sup> *Id.* at 200.

<sup>35</sup> See, e.g., GIDEON’S BROKEN PROMISE, *supra*, at 41-42.

might appear to be a sound public policy to address the dilemma of indigent representation in various places around the nation. And given supporting institutions like the ABA and the gravitas of congressional and scholarly<sup>36</sup> advocates of the past and present, I am reticent and duly cautious in any disagreement with their collective wisdom. Nonetheless, I will briefly discuss some of my concerns regarding the call for federal involvement in the state criminal defense function, which is premised, I believe, on the widely held and often erroneous assumption that a crisis in America necessarily requires congressional action.

To begin with, I have a seemingly small but nonetheless important difference of opinion about the predicate for federal funding. The NRCC Report refers to the right to appointed counsel, first articulated in *Gideon*, as a “significant, high-cost, unfunded mandate imposed upon state and/or local governments.”<sup>37</sup> It is an ingenious argument – attempting to analogize constitutional decisions of the U.S. Supreme Court to requirements imposed on the states by Congress – but in the end, it proves too much. As typically understood, federal unfunded mandates are the product of the discretionary actions of Congress and various federal agencies, coming in the form of normal positive law (i.e., statutes or regulations). In contrast, the Supreme Court’s constitutional decisions are interpretations of the fundamental law of the land, the U.S. Constitution, which the states adopted at the framing and all state officers support by oath.<sup>38</sup>

The Court may have announced *Gideon*, but it is the Sixth Amendment that requires the states to provide for indigent representation. This is no more an “unfunded mandate” than, for instance, the Eighth Amendment command that prisoners be provided food and other human necessities that draw upon state funds. Indeed, almost every constitutional guarantee in the criminal process, especially the full panoply of trial rights (e.g., speedy and public trials, compulsory process, impartial juries drawn from a fair cross-section of the community, etc.), imposes affirmative costs on the relevant jurisdiction.<sup>39</sup> Of course, it would be a nonstarter to claim that Congress thereby has an obligation to compensate the states for their criminal trials and prisons. Instead, the states assume these expenses by choosing to operate a justice system and forcing individuals through the criminal process.

Not only is federal funding of state indigent defense not required by the Constitution, it raises issues related to the constitutional principle of federalism. Grounded in the text and context of the nation’s charter, federalism limits the powers of national government and prevents federal interference with the core internal affairs of the individual states.<sup>40</sup> Since the founding,

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<sup>36</sup> See, e.g., Norman Lefstein, *In Search of Gideon’s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 843 (2004).

<sup>37</sup> JUSTICE DENIED, *supra*, at 5, 29-30.

<sup>38</sup> See, e.g., U.S. CONST. art. VI, § 2.

<sup>39</sup> See, e.g., David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1233-38 (2002).

<sup>40</sup> As James Madison famously wrote in *The Federalist No. 45*, the powers delegated to the federal government would be “few and defined,”

exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961). Federalism was enshrined in the U.S. Constitution by specifically enumerating the powers of the federal government, see U.S. CONST. art. 1, §8; and declaring that all other powers were “reserved to the States respectively, or to the people.” U.S. CONST. amend X.

the Supreme Court has declared on a number of occasions that the federal government does not have a general police power.<sup>41</sup> Among the areas that the Framers sought to reserve to the states was “the ordinary administration of criminal and civil justice.”<sup>42</sup> In more recent times, the Supreme Court has reiterated these limitations on federal involvement in local criminal justice matters, given that the “[s]tates possess primary authority for defining and enforcing the criminal law.” As such, constitutional concerns are raised whenever Congress effects “a significant change in the sensitive relation between federal and state criminal jurisdiction.”<sup>43</sup>

There are various arguments in favor of federalism in this area – such as pluralistic decision-making and local experimentation<sup>44</sup> – that may be impeded by federal interference with state criminal justice systems, which inevitably implicate norms and values that vary by jurisdiction. Most importantly, it may jeopardize “the principal benefit of the federalist system,”<sup>45</sup> the protection of individual liberties. Federalism and its allied doctrine, the separation of powers, create multiple layers of government, all duty-bound to the people rather than to each other. This provides a structural check on every level of government, preventing the concentration of power and the ensuing danger of tyranny.<sup>46</sup>

These are not idle musings. As I understand it, the proposed National Center for Defense Services will not just be a task force, fact-finding committee, study commission, or center in the mold of academe. Rather, the Center will be a comprehensive, fully funded entity with the financial authority “to help the states defray the costs of defense services in criminal and juvenile cases,” “providing grants, sponsoring pilot projects, supporting training, conducting research, and collecting and analyzing data.”<sup>47</sup> In other words, it will be a federal bureaucracy with the authority to make and enforce policy, and to dispense and control millions (if not billions) of dollars. Although the proposal is extremely well-intentioned, caution is warranted in creating any federal body with such powers outside of the basic constitutional framework.

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<sup>41</sup> See, e.g., *Brown v. Maryland*, 25 U.S. 419, 443 (1827); *United States v. Lopez*, 514 U.S. 549, 566 (1995).

<sup>42</sup> THE FEDERALIST No. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The Constitution mentioned only a handful of crimes in its text, all of which were consistent with the design and limits of federalism. See U.S. CONST. art. 1, §8, cl. 6 (counterfeiting); U.S. CONST. art. 1, §8, cl. 10 (piracy, felonies on the high seas, offenses against the law of nations); U.S. CONST. art. 3, §3 (treason). In fact, it was unthinkable to the Framers that the federal government would adopt a full-scale penal code, let alone displace or otherwise interfere with the state criminal justice systems. See, e.g., RUSSELL CHAPIN, UNIFORM RULES OF CRIMINAL PROCEDURE FOR ALL COURTS 2 (1983). As Chief Justice John Marshall would later opine, Congress “has no general right to punish murder committed within any of the States,” and “it is clear that Congress cannot punish felonies generally.” *Cohens v. Virginia*, 18 U.S. 264, 426, 428 (1821).

<sup>43</sup> *Lopez*, 514 U.S. at 561 n.3 (internal citations omitted).

<sup>44</sup> See, e.g., Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484 (1987). In a pluralistic society like ours, citizens in different jurisdictions are likely to have distinct views on the substance and process of criminal justice. State and local decision-makers are more likely to be attuned to such preferences, given their closeness to constituents and the greater opportunity of citizens to be involved in state and local government, including the legal system. Unencumbered by national dictates, states may even become laboratories of experimentation in criminal justice. In the oft-repeated words of Justice Louis Brandeis, “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Should individuals find unbearable the local or state approach to crime and punishment, federalism allows them to vote with their feet, so to speak, by moving to another county or state.

<sup>45</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). “Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” *Id.*

<sup>46</sup> *Id.* See also *Lopez*, 514 U.S. at 553.

<sup>47</sup> JUSTICE DENIED, *supra*, at 200-01.



Government bureaucracies tend to be acquisitive and monopolistic, seeking to maximize their funding and expand their powers. They also create agency costs, serving the self-interests of bureaucrats rather than their principals (i.e., American taxpayers). And in the end, bureaucracies have a tendency toward entrenchment and are almost impossible to eliminate or meaningfully reform after their formation, becoming part of an “iron triangle” between themselves, interest groups, and congressional committees. This is not to say that a National Center for Defense Services cannot be the exception. But relatively recent experience with federal criminal justice bureaucracy – namely, the U.S. Sentencing Commission qua “junior varsity Congress”<sup>48</sup> – has been less than spectacular.

Federal funding in the present context also raises questions of incentive structures. There are circumstances where federal involvement might not only fail to improve a particular problem but may also exacerbate a larger structural infirmity. Congressional funding of indigent defense in a given jurisdiction serves as a sort of “bailout,” where one entity (the federal government) rescues another entity (a state) from its financial distress. The institutional beneficiaries, state lawmakers, are not viewed with the level of skepticism currently focused on corporate America. But as with other, more typical bailouts, congressional funding here raises the specter of *moral hazard*, the economic phenomenon that can be succinctly defined as “the distortions introduced by the prospect of not having to pay for your sins.”<sup>49</sup>

If a given state does not bear the full costs of its criminal justice decisions and instead is able to externalize a politically disagreeable expense on another entity – in this case, passing along the funding of state indigent defense to the federal government – state officials may have little incentive to temper their politically self-serving decisions that extend the criminal justice system. In a worst-case scenario, those states that have met the constitutional requirements may be tempted to skimp on their own budgeting for indigent representation with an eye toward receiving federal support. This is all the more troubling given that, as mentioned above, deadbeat jurisdictions could meet their constitutional obligations: They could fully finance indigent representation through increased taxes or the diversion of funds allocated for other items. Or they could reduce the number of defendants and thus the need for indigent representation by means of decriminalization, diversion, lower sentences, and tempered enforcement. Obstinate jurisdictions have chosen neither option, however, doubtlessly because such actions are viewed as bad politics.

Moreover, there is a real question of fairness if the federal government were to bail out states that have failed to hold up their constitutional responsibilities: *Why should citizens in a state that meets its Sixth Amendment-based financial obligations have to pay for a state that does not?* Under most circumstances, it would be curious (if not perverse) for the federal government to provide funding to a state precisely because it violates the Constitution. Imagine, for instance, a county sheriff’s department that has the ability to provide jail inmates adequate food, clothing, shelter, and so on, but refuses to do so for political reasons. Or imagine a police department that systematically violates the Fourth Amendment rights of pedestrians and motorists. The

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<sup>48</sup> *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting). Cf. Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25 (2005) (critiquing the U.S. Sentencing Commission and U.S. Sentencing Guidelines).

<sup>49</sup> *Decade of Moral Hazard*, WALL ST. J., Sept. 25, 1998.

appropriate response would not be to provide these entities federal funds to, respectively, maintain humane conditions of confinement and refrain from conducting illegal searches and seizures. Instead, they should be given an ultimatum: Meet the constitutional requirements or face, among other things, civil rights litigation.

### **3. CONCLUDING THOUGHTS**

To be clear, federalism in no way relieves a jurisdiction of its obligations to comply with other constitutional principles, such as the right to counsel. So let me reiterate: The states can and must ensure that criminal defendants receive the type of representation demanded by the Sixth Amendment. Moreover, I am not claiming that the courts would invalidate congressional funding on federalism grounds. As a doctrinal matter, Congress's Article I spending powers are essentially unfettered. Instead, the constitutional design and underlying principles caution against the federal government becoming entangled in the internal affairs or assuming the core functions of the states. The values of pluralistic decision-making and localism, as well as the danger of too much power in too few hands, are not trifling and should not be disregarded lightly.

In turn, the public policy considerations mentioned above are only broad and somewhat abstract, stated in the absence of a concrete budget proposal, not the inexorable results of federal funding for state indigent defense. Opposing arguments may point to hopelessly dysfunctional political processes at the state level, for instance, or various legislative techniques that might avoid perverse incentives for funding recipients. My mind remains open on this issue, and, of course, the devil of any legislation would be in its details. Nonetheless, Congress should consider the unintended consequences and inter-jurisdictional equity of absorbing the costs owed by a given state, resulting from the political choices and neglect of its officials, when that state can and, in all good conscience, should pay the bill.

As described upfront, I am a staunch believer that impoverished defendants have the right to competent and appropriately compensated counsel. Although federal involvement in state indigent representation is problematic on a number of grounds, I will not lose sleep if Congress were to create and fund the National Center for Defense Services. The proposal may be flawed as a matter of constitutional principle and public policy, but at least it is based on good intentions and aimed at real constitutional violations. Before closing, however, I would like to briefly mention a few suggestions on what Congress can do without raising the aforementioned issues of constitutional law and public policy.

#### **A. STOP FEDERAL GRANTS TO STATE CRIMINAL JUSTICE**

The NRCC Report describes resource inequities between prosecutors and defense counsel, sometimes resulting from special funding to pursue particular programs, such as drug enforcement. It then recommends that “the level of federal funding for prosecution and defense should be substantially equal.”<sup>50</sup> I agree – although rather than increasing spending for the defense function, the federal government should get out of the business of funding state criminal justice programs altogether. In general, federal grants to state and local government spur wasteful spending on overblown or altogether unnecessary programs, reduce the diversity of

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<sup>50</sup> JUSTICE DENIED, *supra*, at 201 (Recommendation 13).

policies and the motive for innovation, breed layered bureaucracies and opportunities for questionable congressional earmarks, and blur the lines of government responsibility.<sup>51</sup> They also skew state and local policymaking toward federal goals, regardless of the wishes and best interests of the affected citizenry. Worse yet, federal funding under the “Byrne Justice Assistance Grant” program has underwritten law enforcement corruption, racial discrimination, civil rights abuses, and wrongful convictions, epitomized by the massive miscarriage of justice in Tulia, Texas.<sup>52</sup> For the most part, state and local officials should determine policy for their criminal justice systems, unaffected by the federal government; and they alone should bear the costs and consequences of these decisions.

## B. CIVIL RIGHTS LITIGATION

The third chapter of the NRCC Report provides a thorough review of litigation efforts to force recalcitrant states to meet their Sixth Amendment obligations.<sup>53</sup> After analyzing both successful and failed efforts, it lays out a series of principles to enhance the possibility of systematic improvements. This is a fitting approach, with the precise entity responsible for the condition of indigent representation, state government, held to answer for its failure to abide by the Sixth Amendment. In addition, the Report discusses the most prominent federal civil rights statute, 42 U.S.C. §1983, as a viable cause of action and goes on to suggest that “if state courts abdicate their responsibilities, federal courts may be willing to enforce the right to counsel through a habeas corpus petition or class action complaint.”<sup>54</sup>

Not all litigation along these lines has been successful, including lawsuits brought in federal court;<sup>55</sup> and the outcome is uncertain in two pending state cases alleging violations of the Sixth and Fourteenth Amendments and causes of action under §1983.<sup>56</sup> If it turns out that such litigation is failing in state or federal court not because of factual deficiencies but due to prudential barriers (e.g., *Younger* abstention)<sup>57</sup> or limitations in the underlying federal statute, Congress could consider enacting a new cause of action to enforce the Sixth Amendment. Furthermore, the U.S. Department of Justice might begin examining whether certain jurisdictions are systematically violating the Constitution by failing to provide sufficient resources for indigent representation.

## C. FEDERAL GOVERNMENT AS ROLE MODEL

Whether or not federal action ensues, today’s hearing serves a worthy agenda: investigating the problem of indigent representation in state criminal justice, placing the spotlight on those states with deficient systems and encouraging them to comply with their constitutional obligations, and even providing material for judicial decision-making. But Congress can also be

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<sup>51</sup> See, e.g., CATO HANDBOOK FOR POLICYMAKERS ch. 5 (7th ed. 2009) (“fiscal federalism”).

<sup>52</sup> See, e.g., ACLU OF TEXAS, FLAWED ENFORCEMENT (May 2004), available at <http://www.aclu.org/FilesPDFs/flawed%20enforcement.pdf>; Laura Parker, *Texas Scandal Throws Doubt on Anti-Drug Task Forces*, USA TODAY, Mar. 30, 2004.

<sup>53</sup> JUSTICE DENIED, *supra*, at 104-46. See also *id.* at 210-13(Recommendations 19-22).

<sup>54</sup> *Id.* at 136.

<sup>55</sup> See *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992).

<sup>56</sup> See JUSTICE DENIED, *supra*, at 116-17 (discussing *Duncan v. State of Michigan* and *Hurrell-Harring v. New York*).

<sup>57</sup> See *Younger v. Harris*, 401 U.S. 37 (1971).

an exemplar for the states by reexamining the federal criminal justice system. According to a recent estimate, there are at least 4,450 federal crimes in the U.S. Code,<sup>58</sup> a number that would be outrageous in a jurisdiction with a general police power. Particularly troubling are those crimes that duplicate state laws or dispense with traditional constraints on culpability, such as a *mens rea* requirement.<sup>59</sup> Moreover, federal sentencing is in real need of reform to replace the virtually incomprehensible U.S. Sentencing Guidelines regime as well as the inflexible and often draconian mandatory minimum sentences.<sup>60</sup> In fact, Members of this Subcommittee have sponsored bills that seek to address mandatory minimums and provide a more just sentencing scheme. By reforming the federal criminal justice system, Congress would be offering a valuable and perfectly constitutional service to the states – the federal government as role model, not dictator or underwriter.

Likewise, I would encourage Congress to support Sen. Webb’s proposal to create a “National Criminal Justice Commission.” This body would be a true task force or study commission, rather than a new administrative agency. According to the bill’s text, the Commission would:

undertake a comprehensive review of the criminal justice system, make findings related to current Federal and State criminal justice policies and practices, and make reform recommendations for the President, Congress, and State governments to improve public safety, cost-effectiveness, overall prison administration, and fairness in the implementation of the Nation’s criminal justice system.<sup>61</sup>

It has been some time since the last comprehensive governmental study of American criminal justice, and as discussed above, the past few decades have seen the federal and state systems taking turns for the worse. Obviously, the topic of today’s hearing is of critical importance and could be part of the Commission’s charge. But the crisis of indigent representation is the proverbial tip of the iceberg, and any attempt to deal with that issue in isolation may well miss the massive problems that lie beneath. Although it faces a daunting challenge, the proposed Commission seems well worth the effort.

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Again, thank you for the opportunity to speak today. I look forward to answering any questions you may have.

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<sup>58</sup> John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 26, June 16, 2008, available at [www.heritage.org/Research/LegalIssues/upload/lm\\_26.pdf](http://www.heritage.org/Research/LegalIssues/upload/lm_26.pdf). See also ABA TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, *THE FEDERALIZATION OF CRIMINAL LAW* (1998).

<sup>59</sup> See, e.g., Luna, *Overcriminalization Phenomenon*, *supra*.

<sup>60</sup> See, e.g., Luna, *Gridland*, *supra*.

<sup>61</sup> The National Criminal Justice Commission Act of 2009, S.714.